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Supreme Court, U.S.
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No. 95-1098

In The

Supreme Court of the United States

October Term, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that Petitioner cannot recover for pain and suffering under the Fair Credit Reporting Act when no creditor or other person learned of his derogatory credit information from a credit reporting agency and he has failed to show that any of his claimed damages were, in fact, caused by alleged violations of the Act by the Respondent credit reporting agencies.

2. Whether the Court of Appeals properly affirmed the dismissal of Petitioner's claim that Respondent Equifax willfully violated the Fair Credit Reporting Act in the absence of any evidence of willful noncompliance under the "conscious disregard" or "deliberate and purposeful" actions standards that Petitioner cited to the Second Circuit or the "knowledge or reckless disregard" standard that Petitioner now advocates.

STATEMENT PURSUANT TO RULE 29.6

Respondent Equifax Credit Information Services has no nonwholly owned subsidiary. Its parent company is Equifax, Inc., which is publicly held.

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STATEMENT OF THE CASE

Respondent Equifax Credit Information Services ("Equifax") deleted the disputed San Diego County ("San Diego") account from Petitioner's credit file in June 1992, immediately after Petitioner's one and only request. Because San Diego had not reported the alleged debt to Equifax since December 1991 and Petitioner had informed Equifax that he was straightening out his problem directly with San Diego, Equifax deleted the entry with the reasonable expectation that no future reporting by San Diego would occur. However, the account was then unexpectedly re-reported by San Diego to Equifax and automatically entered into Petitioner's credit file. If, during the ensuing 11 months before he commenced this action, Petitioner had ever informed Equifax that the account was re-reported, Equifax would have deleted the account and taken steps to permanently prevent San Diego from re-reporting the account into his credit file.

Petitioner's claim that Equifax negligently violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, ("FCRA") must fail in the absence of evidence that he sustained *any* actual damages as a result. It is undisputed that Petitioner suffered no denials or reductions of credit after he notified Equifax of his dispute. As to Petitioner's claimed damages, the Second Circuit properly held that his pre-action attorney's fees predated any alleged violation of the FCRA, his alleged loss of mortgage opportunity was wholly speculative in light of his failure to make any effort to obtain a mortgage and his claimed emotional distress was not caused by any fault of the credit reporting agencies.

Petitioner criticizes the decision below on damages solely on the basis of the Second Circuit's statement that it did not believe a plaintiff could recover for emotional distress under the FCRA in the absence of any dissemination of his credit report. However, given Petitioner's utter failure to offer evidence of emotional distress caused by Respondents, the Second Circuit's statement of belief is not necessary to the determination of this action. Moreover, contrary to the allegations of the Petition, the Second Circuit's statement is eminently correct and reasonable under the FCRA and not in conflict with other Circuit Court opinions.

The record facts also fail to support Petitioner's claim that Equifax willfully failed to comply with the FCRA. Although Petitioner now seeks to appeal from the standard for willful noncompliance applied by the Circuit Court, he did not appeal from the same standard applied by the district court and, indeed, in his brief to the Circuit Court he cited with approval the very language that he now contests. In any event, even applying the "knowledge or reckless disregard" standard that Petitioner now advocates, the facts simply do not support a finding of any willful noncompliance on the part of Equifax.

A. EQUIFAX

Equifax is a consumer reporting agency which maintains a database of credit information made available to its subscribers in accordance with the FCRA. Equifax's database is composed largely of accounts receivable

information supplied monthly by its subscribers on magnetic computer tapes. Account information is automatically included in consumers' credit files when the tapes are loaded into Equifax's database. (JA 127-128).[1]

B. PETITIONER'S CREDIT DISPUTE

Petitioner's credit dispute arose from an interstate child support matter he litigated in New York State Family Court over a seven-year period, from 1982 to 1989. He described the "fight" as "long and ugly and bitter." (JA 148). San Diego apparently sued Petitioner to recover child support funds it allegedly expended on behalf of his estranged spouse and three children. (JA 265-266). Eventually, Petitioner's support obligations were declared terminated by an order of the Family Court and the file of his case was sealed. (JA 148). However, it appears that San Diego was unaware of such determination. (JA 266).

In March 1992, Petitioner was notified by two banks that his applications for credit cards had been declined. (JA 151). One rejection stated that Petitioner had made "too many recent requests for credit" (JA 193) and the other stated: "Housing type does not indicate stability, derogatory records present and delinquent credit obligations." (JA 199). The latter denial invited Petitioner to submit any additional information he wished to have considered, which Petitioner never did.

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[1] "JA ___" refers to the page of the Joint Appendix submitted to the Second Circuit.

Petitioner then obtained copies of his credit files from the Respondents, both of which contained an entry indicating that an outstanding child support obligation of $4,350 was claimed by San Diego. (JA 152, 204, 205). Petitioner and his attorney wrote to the Respondents requesting that the child support entry be expunged from his credit files and enclosed copies of documents from New York State Family Court indicating that the child support obligation had ceased. (JA 184-192). Petitioner's letter to Equifax also requested that other details in his credit file be amended. (JA 185).

In early June 1992, Equifax provided Petitioner with a copy of his updated credit file showing that Equifax had, pursuant to his request, deleted the San Diego entry and made other changes in his credit file. (JA 156, 228, 229). Because San Diego had not reported the alleged debt since December 1991, Equifax deleted the entry with the reasonable expectation that no re-reporting by the source would occur. (JA 128-129). No indication of a dispute was retained in Petitioner's file because the disputed item was deleted. (JA 337). By letter dated June 18, 1992, Petitioner thanked Equifax for its "expeditious response" in correcting the misinformation and stated that he and his attorney would be "locating and dealing with the reporting source from which this information originated." (JA 230).

Under these circumstances, Equifax had no reason to believe this matter would require further attention. (JA 129). However, on July 3, 1992, San Diego unexpectedly submitted the information again and it was consequently re-included in Petitioner's credit file by Equifax's automated system about 10 days later. (JA 127-129, 337-338).

Thus, in late July 1992, when Equifax, upon Petitioner's request, sent him another copy of his credit history, it again contained the San Diego child support entry. (JA 157, 235). Inexplicably, Petitioner did not contact Equifax regarding this matter at that time or, indeed, until he served the complaint in this action almost one year later. (JA 337). Equifax then deleted and permanently blocked the disputed item from Petitioner's file in July 1993. (JA 129). Had Petitioner notified Equifax of the item's reappearance when he became aware of it in July 1992, the problem would have been permanently resolved at that time. (JA 338).

Although San Diego advised Petitioner's attorney in October 1992 that Petitioner owed no money (JA 267-268) and, according to documents Petitioner submitted in support of his Rule 60(b) motion, purportedly advised Respondents that Petitioner's case was "closed per court order of responding state" (Supplemental Appendix of Appellant submitted to Second Circuit, at 365, 367), it continued to report the alleged debt as delinquent. San Diego sent Petitioner a notification dated November 2, 1992 indicating that he *still* owed $4,350 in overdue support and that such information "will be given to credit reporting agencies . . . " (JA 169, 276-277). In December 1992, San Diego again reported the child support obligation to the Respondents. (JA 269, 271, 337).

Petitioner did not contact either Respondent after receiving the November 1992 notice from San Diego that he still owed child support, other than to obtain another disclosure of his credit file in February 1993. When he found the San Diego entry contained therein he made no effort to notify the Respondents that any problem existed.

Indeed, prior to commencing this action in June 1993, Petitioner never contacted Equifax after his June 18, 1992 communication in which he indicated that his credit file had been *corrected*. (JA 161, 230).[2]

C. PETITIONER'S FAILURE TO SUSTAIN ANY DAMAGES

Petitioner was not denied any credit nor were any of his existing credit lines reduced after he notified Equifax about the disputed entry. (JA 63-64). In fact, Petitioner's credit file of February 19, 1993 (JA 269), compared with his credit file of July 20, 1992 (JA 235), shows that two of his accounts, MBNA AMER and DISCVR CD, received substantial increases in their credit limits during the time period in which Petitioner alleges he was harmed by Equifax.

Petitioner claims he wanted to buy a home (JA 149) but lost the opportunity to obtain a mortgage. (JA 109). However, Petitioner never applied for a mortgage nor made any offer on any house. He never even spoke with a banker, a mortgage broker or his own attorney about his possibilities of obtaining a mortgage. (JA 111, 113). Although Petitioner possessed documents that demonstrated he did not owe money to San Diego, he made no

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[2] Given Equifax's willingness to delete the San Diego entry immediately upon Petitioner's *single* request and Petitioner's failure to ever advise Equifax that the San Diego entry was re-reported after Equifax deleted it, Petitioner's repeated references to Equifax "obdurately" refusing to correct his credit history (Petition, 12, 18, 22) and to his "Orwellian nightmare" (Petition, 11) are hyperbolic, to say the least.

effort to satisfy any prospective lender of his credit worthiness. (JA 114-118, 184-190). He was allegedly dissuaded from obtaining a mortgage based solely on his speculative proposition that a hypothetical mortgage application to an undetermined lender for the purchase of an unspecified house would have been declined because of a particular entry in his credit report.

Petitioner also claimed that the San Diego entry in his credit file caused him emotional distress. He had submitted an application to a volunteer fire department in March 1992, at which time he signed a release permitting an investigation into his background. (JA 151).[3] According to Petitioner's companion, "he was afraid that a credit check would be part of the investigation, and . . . he'd be turned down if they saw the San Diego entry." (JA 289). He was also "worried that there might be an outstanding arrest warrant out for him that he didn't know about (something that actually happened during his struggle with the Family Court) and that he'd be arrested on the job or on the street." *(Id.)* Nevertheless, he was accepted into membership in the fire department without incident on or about June 1, 1992 (JA 154) – prior to any alleged fault on the part of Equifax for re-including the San Diego entry in Petitioner's credit file in July 1992. (JA 337-338.)

Nowhere in the record does Petitioner claim that anyone in his community, or anyone that he knew, ever

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[3] Contrary to the allegations of the Petition, the fire department required an unspecified background check (JA 195), not a "background and *credit* check." (Petition, 9 (emphasis added)).

learned about the San Diego child support entry. When repeatedly questioned on the subject of damages during his deposition, Petitioner did not claim he had suffered any emotional or mental harm due to a disclosure of his Equifax credit file. (JA 109, 121, 122). Indeed, there is *no* evidence in the record that Petitioner sustained emotional distress arising in any way from an Equifax credit report during the period of Equifax's alleged fault beginning July 1992. As the district court found, the record in this case abundantly shows that any distress allegedly experienced by Petitioner directly related to his ongoing dispute with San Diego, including, among other things, its causing the IRS to seize his 1991 tax refund. (A20, 23.)[4]

Petitioner also claims he incurred damages consisting of pre-action attorney's fees. However, these fees were exclusively incurred before he submitted his dispute to Equifax and consequently pre-dated any alleged violation of the FCRA by Equifax.

D. THE PROCEEDINGS BELOW

The district court granted summary judgment for Respondents. (A13-25.) It correctly held that Equifax properly handled Petitioner's dispute when it deleted the San Diego item and never heard from Petitioner again:

> The record shows that Equifax did promptly delete the disputed delinquency upon petition by plaintiff. Later, when San Diego County again reported the delinquency, Equifax re-entered it in plaintiff's credit file. In light of

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[4] "A___" refers to the page of the Appendix to the Petition.

> Equifax's unquestioning deletion of the delinquency item the first time plaintiff complained . . . there is no reason to doubt that they either would have similarly deleted the item if the plaintiff had complained a second time or investigated at such time. However, plaintiff never made such a second complaint to Equifax. He chose to break off communications with Equifax, apparently to deal with the problem at its source: San Diego County. Therefore, under these circumstances, Equifax investigated reasonably and sufficiently.

(A18-19.) The district court further held that Equifax, having deleted the disputed entry and having received no challenge to its reappearance, could not have expected that the inclusion of a dispute statement in Petitioner's credit report was necessary. (A20-21.)

The district court granted summary judgment on the additional ground that Petitioner presented no evidence of damages attributable to Respondents. (A21-24.) The court found that Petitioner's two denials of credit preceded his initial notification to Respondents. It is undisputed that San Diego reported the account to the credit reporting agencies. Accordingly, Respondents were not even arguably negligent before they received plaintiff's initial dispute, and the court held the denials of credit could not be blamed on Respondents. (A22.) The court rejected as too speculative Petitioner's claim that he was discouraged from applying for a mortgage. (A22-23.) Although the court recognized that emotional distress can constitute actual damages under the FCRA, it found, from the affidavit evidence Petitioner submitted, that his alleged distress was caused by San Diego continuing to

assert its claim rather than by Respondents reporting it. (A23-24.) Finally, the court found no evidence of a willful violation to support punitive damages under the FCRA. (A24.)

The district court denied Petitioner's motion for relief from summary judgment due to newly discovered evidence on the grounds that the purported evidence was merely cumulative and would probably not lead to a different decision on the summary judgment motion. (A26-28.) In addition, the court concluded that with due diligence Petitioner could have uncovered the evidence earlier. (A28.)

The Second Circuit affirmed the district court on the ground that Petitioner "utterly failed to produce any evidence constituting damages under the FCRA." (A6.) The court did not address the other grounds for the district court's decision. With respect to damages, the court considered and rejected Petitioner's claims for three categories of actual damages and for punitive damages.

The court first addressed Petitioner's claim for pre-litigation attorney's fees in the amount of $2,641. Since these fees represented the cost of letters notifying Respondents of Petitioner's dispute, they predated any possible liability under the FCRA and could not be compensable as actual damages. (A7-8.)

Next, the court affirmed the district court's holding that Petitioner's alleged emotional distress was not caused by Respondents' alleged violations of the FCRA. (A8-10.) The court noted that since there was no evidence that Respondents provided Petitioner's credit report to

any third parties or that anyone learned of any harmful information from Respondents:

> [Petitioner's] argument boils down to the bare contention that he is entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report."

(A9 (emphasis original).) The court expressed its belief that such a claim could not be established in the absence of evidence that a creditor or other person learned of derogatory information from a credit reporting agency. (A9-10.)

As to Petitioner's claim that he lost the opportunity to obtain a home mortgage, the Circuit Court affirmed the district court's holding that his claims were too speculative. (A10-11.) The court held that Petitioner "has completely failed to meet his burden of demonstrating any damages resulting from being deprived of a loan." (A11.)

Finally, the Second Circuit agreed with the district court that "the record is devoid of any evidence supporting a theory of willful noncompliance." (A11.) The evidence Petitioner presented on his Rule 60(b) motion simply suggested to the court that San Diego was sending mixed signals to Petitioner and Respondents. (A12.) The court held that these circumstances do not support "the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA." (A12.)

In the absence of any evidence supporting actual or punitive damages, the Circuit Court affirmed the dismissal of Petitioner's claims.

REASONS FOR DENYING THE WRIT

POINT I

THE SECOND CIRCUIT'S STATEMENT THAT IT DID NOT BELIEVE A PLAINTIFF COULD RECOVER FOR PAIN AND SUFFERING UNDER THE FCRA WHEN HE HAS FAILED TO SHOW THAT ANY CREDITOR OR OTHER PERSON EVER LEARNED OF DEROGATORY INFORMATION FROM A CREDIT REPORTING AGENCY IS (A) NOT NECESSARY TO THE DETERMINATION OF THIS ACTION, (B) EMINENTLY CORRECT AND REASONABLE UNDER THE FCRA, AND (C) NOT IN CONFLICT WITH OTHER CIRCUIT COURT OPINIONS

A. The Second Circuit's Statement is Not Necessary to the Determination of this Action

The Second Circuit affirmed the district court's rejection of Petitioner's pain and suffering claim on the ground that the alleged damages were not caused by Respondents:[5]

[5] Petitioner's criticism of the Second Circuit's statement is relevant only to the dismissal of his claim for pain and suffering – which was the sole subject of the court's statement. (A10.) Petitioner's other alleged damages were dismissed for reasons Petitioner is not now contesting. His claim for loss of mortgage opportunity was rejected by the Court as speculative (A10-11) and his claim for pre-action attorney's fees failed because the fees were incurred before the Respondents' alleged violations of the FCRA. (A7-8.)

> The [District] Court concluded, however, that appellant was not entitled to pain and suffering damages in this case, because he had failed to show that his emotional distress was *caused* by Equifax and Trans Union, as opposed to San Diego. Thus, appellant's claims were apparently rejected due to a *lack of causation* between the harm alleged by Casella and appellees' alleged violations of the FCRA. We think this was proper."

(A9 (citations omitted) (emphasis added).) In affirming the district court on causation grounds, the Circuit Court noted *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995), in which the Ninth Circuit held that a cause of action may exist under the FCRA even absent a denial of credit. Without stating whether it would agree with *Guimond*, the Circuit Court set forth its *belief* that a plaintiff could not recover for pain and suffering under the FCRA unless there had been a dissemination of his credit report:

> Whether or not we would agree with *Guimond*, we do not believe a plaintiff can recover for pain and suffering when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency."

(A10.)

Petitioner's criticism of the decision below appears to be premised on the mistaken notion that the Second Circuit simply created a new rule of law and dismissed Petitioner's pain and suffering claim for failing to meet its new criterion. On the contrary, the Second Circuit appears to have reviewed the record, found that plaintiff

could not prove his damages were caused by Respondents and then stated its general belief that no plaintiff could establish that alleged pain and suffering was caused by a credit reporting agency in the absence of any dissemination of his credit reports.

Petitioner, by predicating the Petition only on his criticism of the Circuit Court's statement, ignores the preceding and vitally important point that the facts simply do not support his claim that he was injured by Respondents' alleged violations of the FCRA. His failure to prove that any damages were caused by Respondents is illustrated by the *only* alleged pain and suffering set forth in the Petition – his alleged fear that a background check in connection with his application to be a volunteer fireman would lead to a dissemination of the erroneous San Diego entry to his neighbors. (Petition, 9-10.) This fear was obviously laid to rest by June 1, 1992, when Petitioner was accepted into membership in the fire department. (JA 154.) Since Equifax had no potential liability until the San Diego entry re-entered Petitioner's credit file in July 1992 (JA 337-338), Petitioner's alleged pain and suffering entirely preceded and could not have been caused by any violation of the FCRA by Equifax.

A careful review of the record reveals no evidence of emotional distress caused by Petitioner's Equifax credit history after Equifax's alleged violation of the FCRA in July 1992. Petitioner could produce no evidence that any individual or business learned the contents of his credit report during the relevant period. He does not allege any facts showing damage to his business or personal reputation. In fact, he makes no specific allegation that he was

in any way emotionally distressed during the relevant period. As aptly noted by the Circuit Court:

> Casella's argument boils down to the bare contention that he is entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report."

(A9 (emphasis original).) Thus, the Second Circuit properly held – on the facts – that Petitioner failed to establish that Respondents' alleged violations of the FCRA caused him emotional distress. The Court's belief that a plaintiff could not establish pain and suffering in the absence of a dissemination of his credit report was not necessary to its decision and could be eliminated without affecting the determination of this case.

B. The Second Circuit's Statement is Eminently Correct and Reasonable Under the FCRA

The Second Circuit's statement that it did not believe a plaintiff can recover for pain and suffering in the absence of any dissemination of his credit report is eminently correct and reasonable under the language and purpose of the FCRA.

First, the language of the relevant provisions of the FCRA plainly limits their application to credit reports disseminated to third parties and not credit files retained in-house by credit reporting agencies. Section 1681e(b) requires a consumer reporting agency to follow reasonable procedures to assure maximum possible accuracy whenever it prepares a "consumer report." The term "consumer report" is defined as "any written, oral or

other *communication* of any information by a consumer reporting agency" for the purpose of serving as a factor in establishing a consumer's eligibility for, among other things, credit and employment. 15 U.S.C. § 1681a(d) (emphasis added). Thus, the "consumer report" upon which liability under § 1681e(b) can be predicated is by definition a credit report that is communicated to third parties.

A "consumer report" is distinct from a consumer "file," which is defined as "all the information on that consumer recorded and retained by a consumer reporting agency." 15 U.S.C. § 1681a(g). It is a consumer's "file," not his "report," that a consumer reporting agency must disclose to the consumer upon his request, 15 U.S.C. § 1681g(a), and that Petitioner received several times from Equifax. A consumer's concern about the contents of his "file," like Petitioner alleges here, does not state a claim under the language of § 1681e(b).[6]

Second, the Circuit Court's statement, if applied to other cases, would – like the existing case law – reasonably serve to limit claims under the FCRA to circumstances that are susceptible of proof beyond a plaintiff's subjective statements about his state of mind. In each case finding that emotional harm was a viable claim, it is clear

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[6] Similarly, § 1681i(c) requires consumer dispute statements under certain circumstances in "any subsequent consumer report." The statutory language again predicates liability on the dissemination of credit information to a third party. Section 1681i(a), which governs the reinvestigation of disputed information in a consumer's "file," is inapplicable here because Equifax deleted the San Diego entry immediately upon Petitioner's request.

that the consumer's injury was reasonably connected with a disclosure of his erroneous credit report to others. *See, e.g., Thompson v. San Antonio Retail Merchants Ass'n,* 682 F.2d 509, 514 (5th Cir. 1982). *But cf. Guimond,* 45 F.3d at 1332 (allowing claim for emotional distress when the defendant did not contest the existence or causation of the alleged damages). If pain and suffering were freely recoverable simply for viewing an adverse entry in a credit file, the door would be opened to a new type of claim under the FCRA, free of any objective standard and unlimited by anything but the creativity of the claimant. Such a drastic change in the law would obviously interfere with credit reporting agencies' ability to serve the "vital role" that Congress recognized when it enacted the FCRA. 15 U.S.C. § 1681(a).

Finally, Petitioner's concern that the Second Circuit's decision requires a consumer to encourage the dissemination of damaging information before he can commence a lawsuit (Petition, 12) ignores the consumer's right to punitive damages for a willful violation of the FCRA. 15 U.S.C. § 1681n. If Petitioner had genuinely been concerned about the dissemination of damaging information, he could have followed up on his one and only request that Equifax delete the San Diego entry. If he had, Equifax would have deleted and permanently blocked the account from his credit file. Had Equifax then refused to delete the account and willfully violated the FCRA, Petitioner could have commenced an action for punitive damages.

Another available remedy for violations of the FCRA is enforcement by the Federal Trade Commission ("FTC"). Under the FCRA's administrative enforcement

provision, consumer reporting agencies' "compliance" with the FCRA "shall be enforced" by the FTC. 15 U.S.C. § 1681s(a). Violations of the FCRA constitute unfair or deceptive acts or practices under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, and are subject to enforcement by the FTC under Section 5(b) of that statute. 15 U.S.C. § 1681s(a).

Accordingly, the Second Circuit's belief that a plaintiff cannot recover for pain and suffering in the absence of any dissemination of his credit report is consistent with the language and purpose of the FCRA and presents no obstacle to strict enforcement of the Act.

C. The Second Circuit's Statement Does Not Conflict with the Decisions of Other Circuit Courts

Even a cursory review of the Second Circuit's opinion reveals the outright falsity of Petitioner's representations that the Second Circuit "acknowledged" (Petition, 3 and 13) and "recognized" (Petition, 16) that its decision conflicted with the Ninth Circuit in *Guimond*. In *Guimond*, the Ninth Circuit held that a failure to comply with § 1681e(b) can be actionable even in the absence of a denial of credit. 45 F.3d at 1333. Rather than conflict with *Guimond*, the Second Circuit noted the language of *Guimond* and expressly refused to reach the issue on which the Ninth Circuit opined. (A10.) Instead, it stated its belief that a plaintiff could not recover damages for pain and suffering in the absence of a dissemination of his credit report. (*Id.*) The Second Circuit in no way "recognized" or "acknowledged" that its decision conflicted with *Guimond*.

In any event, *Guimond* is of little relevance here because the defendant consumer reporting agency in *Guimond* "did not contest [the consumer's] claims of damages, nor that those damages were the result of the inaccuracies in her credit report." 45 F.3d at 1333. Here, in contrast, Respondents contested the existence and causation of Petitioner's claimed damages. The issue on which the Second Circuit affirmed summary judgment – *i.e.*, Petitioner's failure to offer evidence that he sustained damages as a result of Respondents' violation of the FCRA – was not even before the court in *Guimond*.

Petitioner also claims that the decision below conflicts with *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), which he cites for the proposition that the FCRA does not limit recovery to damages caused by publication to third parties. However, Petitioner fails to explain that *Stewart* involved the "unusual circumstance" in which the defendant consumer reporting agency was also the user of the credit report. *Id.* at 154 n.12. There was, in effect, a transmission of the plaintiff's credit report from the defendant as a credit reporting agency to the defendant as an entity to which the plaintiff had applied for membership. The court in *Stewart* merely established a narrow – and quite obvious – exception that there can be liability under the FCRA without a publication to a third party when the consumer reporting agency and user of the credit report are the same entity.

In every other case cited by Petitioner, the alleged emotional distress accompanied damages arising directly from the dissemination of a credit report to third parties. *See Thompson v. San Antonio Retail Merchants Ass'n*, 682

F.2d 509, 514 (5th Cir. 1982) (plaintiff suffered embarrassment from being denied credit on three occasions); *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993) (plaintiff was denied credit three times and experienced "considerable embarrassment" from having to discuss his erroneous credit report with business associates and creditors); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976) (insurance policy canceled until erroneous report corrected); *Bryant v. TRW, Inc.*, 689 F.2d 72, 75 (6th Cir. 1982) (plaintiff denied mortgage loan because of an erroneous credit report). In each of these cases, the dissemination of a credit report objectively injured the plaintiff and provided a reasonable predicate for his alleged emotional distress. These cases are clearly not in conflict with the decision below, in which Petitioner's credit report was not disseminated and Petitioner did not proffer any evidence supporting his allegation of emotional distress during the relevant time period.

In sum, Petitioner has mischaracterized the Circuit Court's decision in order to create the appearance of a conflict that does not exist. The court's statement that it did not believe a plaintiff could establish pain and suffering under the FCRA in the absence of a dissemination of his credit report is consistent with the language and purpose of the FCRA, as well as the existing circuit court decisions. Moreover, Petitioner's criticism of the Second Circuit's statement, even if justified, would not warrant review because the court's statement was not necessary to its determination of this action. As the Second Circuit properly found, Petitioner has simply failed to demonstrate that Respondents caused any alleged damages. Accordingly, review should be denied.

POINT II

THE SECOND CIRCUIT'S CONSTRUCTION OF WILLFUL FAILURE TO COMPLY WITH THE FCRA IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE INTERPRETATION OF "WILLFUL"

The FCRA permits the recovery of actual damages upon a showing that a reporting agency acted negligently. 15 U.S.C. § 1681o. However, in order to recover punitive damages, a plaintiff must meet a much stricter burden and demonstrate that the agency has "willfully" failed to comply with its obligations under the FCRA. 15 U.S.C. § 1681n. In the instant case, both the district court and the Circuit Court properly found that Respondents did not act willfully. Petitioner, dissatisfied with that result, now incorrectly argues that the Circuit Court applied an interpretation of "willfully" that is inconsistent with the standard that this Court has applied to other statutes. In fact, the standard used by the Circuit Court was entirely appropriate and completely consistent with this Court's previous – and varied – interpretations of "willfully."

Contrary to Petitioner's suggestion that there is one definition for "willfully" that must be applied in every instance, this Court has repeatedly held that " 'willful' . . . is a word of many meanings, its construction often being influenced by its context." *United States v. Bishop*, 412 U.S. 346, 352 (1973); *United States v. Murdock*, 290 U.S. 389 (1933); *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994); *Spies v. United States*, 317 U.S. 492 (1943). In fact, this Court's definition of "willful" has varied and includes the following: "obstinate[ ]," or "plainly indifferent," *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239,

243 (1938); "without justifiable excuse," "stubbornly, obstinately, perversely," or "done without ground for believing it is lawful," *United States v. Murdock*, 290 U.S. 389, 394 (1933); "knowledge" that actions are in violation of law, *Ratzlaf*, 114 S. Ct. at 663; "reckless disregard," *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130 (1988) and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985); and "voluntary and intentional violation of duty," *Cheek v. United States*, 498 U.S. 192, 201 (1991).

This Court has also used *Roget's International Thesaurus* to supply various definitions of "willful." *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (quoting *Roget's International Thesaurus* § 622.7, at 479; § 653.9, at 501 (4th ed. 1977)). That source provides a wealth of acceptable synonyms for "willful," including "deliberate," "calculated," "purposeful" and "conscious." *Roget's International Thesaurus* § 653.9, at 501 (4th ed. 1977).

In this case, the Circuit Court applied a valid and reasonable standard and found that the actions of Respondents did "not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim of willful noncompliance under the FCRA." (A12.) The court's analysis is completely consistent with the way other courts have interpreted the punitive damages section of the FCRA using the "conscious disregard" standard as an equivalent for the myriad of acceptable expressions for "willfully." *See, e.g., Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993) (requiring "conscious disregard"); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986) (applying "conscious disregard" test), *cert. denied*, 483 U.S. 1022 (1987); *Yohay v. Alexandria*

Employees Credit Union, Inc., 827 F.2d 967, 972 (4th Cir. 1987) (awarding punitive damages based on finding that defendant "consciously ignored" plaintiff's rights); *Wiggins v. District Cablevision, Inc.*, 853 F. Supp. 484, 490 (D.D.C. 1994) (applying "conscious disregard" standard).

In this action, the "conscious disregard" standard was first applied by the district court, which held: "To be found in willful noncompliance, a defendant must have knowingly and intentionally committed an act in conscious disregard for the rights of others." (A24.) Petitioner failed to appeal from that standard applied by the district court, thereby failing to preserve the issue for further appeals. *See Clark v. State Farm Fire & Casualty Ins. Co*, 54 F.3d 669, 673 (10th Cir. 1995) (failure to raise an issue in the court below precludes the raising of that issue in subsequent appellate actions).

Moreover, in his brief to the Second Circuit, Petitioner cited with approval the very standards that he now criticizes that court for adopting. At page 39 of Petitioner's brief, he stated: "In other words, appellees' *'conscious disregard'* of Casella's rights under FCRA prove [sic] willfulness." (Emphasis added). Also on that page, he quoted *Nitti v. Credit Bureau of Rochester*, 84 Misc. 2d 277, 375 N.Y.S.2d 817, 821 (Sup. Ct. Monroe Co. 1975), for the proposition that a defendant's actions willfully violated the FCRA because they "were not accidental . . . not innocent . . . not unintentional; but rather . . . they were *deliberate and purposeful.*" (Emphasis added). It is astounding that Petitioner now seeks to appeal from both the "conscious disregard" and "deliberate and purposeful" language that he himself suggested to the Second Circuit.

Petitioner attempts to rely on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which the Court held that a "knowledge or reckless disregard" standard should be applied to allegations of willful violations of the Age Discrimination in Employment Act of 1967. However, the Court in *Hazen* made no attempt to promulgate "knowledge or reckless disregard" as the test for willful violations in all contexts. Moreover, Petitioner fails to cite a single case under the FCRA in which *Hazen* is identified as providing the appropriate standard for review.

A "reckless disregard" standard is used most often in libel cases when courts must determine whether a defendant published an article in "reckless disregard" of its falsity. In that context, this Court has described the "reckless disregard" standard as follows: "[The standard] is not measured by whether a reasonably prudent [person] would have published, or investigated before publishing [but whether a particular defendant] in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In fact, this is a subjective evaluation focused on whether a defendant has acted in good faith. *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 898-99 (5th Cir. 1985), *cert. denied*, 475 U.S. 119 (1986).

In the instant case, Petitioner presented no evidence that Equifax willfully violated the FCRA under the "reckless disregard" standard or any other legal standard. In fact, the district court correctly found from the undisputed evidence that Equifax acted reasonably in light of the information sent to it by San Diego. (A17-21). As noted by the district court, Equifax "did promptly delete the disputed delinquency" upon Petitioner's one and

only request. (A18). At that time, San Diego had not reported the alleged debt for six months, rather than every month as debts are usually reported (JA127-128), and Petitioner informed Equifax that he was straightening out his problem directly with San Diego. Accordingly, Equifax deleted the entry with the reasonable expectation that no future reporting by San Diego would occur. The account was subsequently re-included in Petitioner's credit file only because it was unexpectedly re-reported by San Diego by magnetic tape. When Equifax inputted San Diego's tape into its database, the disputed account was automatically included in Petitioner's file.

Almost immediately thereafter, Petitioner received a copy of his Equifax credit history containing the San Diego child support entry. He later received a notice from San Diego dated November 2, 1992, indicating that he still owed $4,350 in overdue child support and that such information "will be given to credit reporting agencies."

Inexplicably, Petitioner never followed up on his one and only request to Equifax after learning that San Diego was still reporting his account and that it had been re-included in his credit history. Instead, he simply obtained copies of his credit history, which Equifax repeatedly supplied upon his request, and, without a further word, commenced this action almost one year later. If Petitioner had notified Equifax of the San Diego item's reappearance when it occurred, Equifax would have permanently resolved the problem at that time. (JA 338.) However, Equifax received no information from Petitioner after June 1992, at which time he indicated that his credit history had been corrected. (JA 161, 230.) In the

meantime, San Diego continued to report the child support obligation to the Respondents. (JA 269, 271, 337.)[7]

Under these facts, there is no basis for finding willful non-compliance with the FCRA under any theory. Indeed, Petitioner cites *no* case in which reasonable conduct like Equifax's has been held to willfully violate the FCRA. To the contrary, under the well-established body of case law interpreting the FCRA, where a credit reporter, like Equifax here, provides the consumer with a copy of his credit history each time a request is made, does not conceal any information from him and cooperatively attempts to resolve his complaints, there simply is no basis for a finding of willful noncompliance. *Stevenson v. TRW*, 987 F.2d 288, 294 (5th Cir. 1993) (punitive damages vacated); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022; *Morris v. Credit Bureau of Rochester*, 563 F. Supp. 962, 969 (S.D. Ohio 1983).

Accordingly, review of the Second Circuit's holding that Equifax did not willfully violate the FCRA is not warranted.

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[7] Even if the Universal Data Forms that Petitioner submitted in support of his Rule 60(b) motion are considered despite his failure to satisfy the requirements of Rule 60(b), these forms, as the Second Circuit found, indicate at most that San Diego was sending "mixed signals" and do not establish any willful violation by Respondents. (A11-12.)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
March 12, 1996

Respectfully submitted,

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